

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

QUALCOMM INCORPORATED,

Cross-complainant and Appellant,

v.

INDUSTRIAL INDEMNITY COMPANY  
et al.,

Cross-defendants and Appellants..

D036194

(Super. Ct. No. 695493)

APPEALS from a judgment of the Superior Court of San Diego County, Vincent P.  
Di Figlia and Thomas R. Murphy, Judges. Affirmed.

Cross-complainant Qualcomm Incorporated (Qualcomm) appeals a judgment in its favor, to the extent the judgment denies it indemnification from cross-defendants Crum & Forster and Industrial Indemnity Company (together Industrial) for a judgment against Qualcomm's assignor in an underlying action. Qualcomm contends the court erred by determining there was no "property damage" within the meaning of the policy during the

policy period, and thus no coverage, and alternatively, it was not entitled to the amount of the judgment in the underlying action as damages for Industrial's breach of the duty of defense. Qualcomm also challenges the court's disposal of its punitive damages claim on summary adjudication.

Industrial moves to dismiss the appeal as premature, asserting the judgment does not dispose of each of Qualcomm's causes of action. Industrial also appeals the judgment, contending the court erred by finding the work product exclusion in Industrial's policy inapplicable, determining Industrial breached the duty to defend as a matter of law and awarding Qualcomm the costs its assignor incurred in retaining *Cumis* counsel.<sup>1</sup>

We deny the motion to dismiss and affirm the judgment based on the policy's work product exclusion.

#### FACTUAL AND PROCEDURAL BACKGROUND

In March 1993 Qualcomm purchased the San Diego Design Center (Design Center) from McKellar Development of La Jolla (McKellar). McKellar assigned its contracts and rights relating to the construction of the Design Center to Qualcomm.

In May 1993 Qualcomm discovered corrosion and leaks in underground insulated pipes of the Design Center's heating, ventilation and air conditioning (HVAC) system. Padre Mechanical, Inc. (Padre) had contracted with McKellar to install the HVAC system.

---

<sup>1</sup> "Cumis counsel" is the moniker for independent counsel who the insurer must retain at its expense "where there are divergent interests of the insured and the insurer brought about by the insurer's reservation of rights based on possible noncoverage under the insurance policy." (*San Diego Federal Credit Union v. Cumis Ins. Society, Inc.* (1984))

Padre's subcontractors originally installed the pipes and insulation. However, when it was discovered that the pipes were not installed at the correct depth, Padre removed them, dug deeper trenches and replaced them. In the process, Padre damaged the insulation, which exposed the pipes to moisture and caused premature corrosion and leaking. Padre completed its work on the Design Center in September 1989.

In May 1994 Qualcomm sued Padre for breach of contract and related counts, alleging defects in the HVAC pipes and insulation. Qualcomm sought the cost of repairing or replacing a substantial portion of the HVAC system.

Padre tendered the defense of the underlying action to Industrial, which insured it under a comprehensive general liability (CGL) policy between May 1989 and May 1990. Industrial denied Padre a defense on the ground that a leak in the underground pipes was not "manifested," or discovered, within the policy period.

Padre also tendered the defense of the underlying action to Golden Eagle Insurance Company (Golden Eagle), which insured it between May 1990 and May 1993. Golden Eagle accepted the defense under a reservation of rights. Its in-house counsel successfully moved to set aside a default judgment entered against Padre, and represented Padre throughout trial. After a court trial, Qualcomm obtained a judgment against Padre for \$229,273, the cost of repairing the HVAC system, and \$25,752.25 in attorney fees and costs.

---

162 Cal.App.3d 358, 375; Civ. Code, § 2860 [clarifying and limiting the rights and responsibilities set forth in *Cumis, supra*, 162 Cal.App.3d 358].)

Golden Eagle then filed a declaratory relief action against Padre, alleging the work product exclusion of its policy relieved it of any responsibility to indemnify Padre for the underlying judgment. Padre, which lacked assets to pay the underlying judgment, assigned its rights against Golden Eagle and Industrial to Qualcomm.

Qualcomm filed a cross-complaint against Industrial and Golden Eagle, but the action was stayed as to Golden Eagle after the California Insurance Commissioner was appointed as its conservator and liquidator. In a first amended cross-complaint, Qualcomm included causes of action against Industrial for breach of contract and breach of the implied covenant of good faith and fair dealing. Qualcomm sued Industrial as the judgment creditor of Padre<sup>2</sup> and as the assignee of Padre's claims against Industrial.

Industrial successfully moved for summary adjudication as to Qualcomm's prayer for punitive damages. The court determined that Industrial met its burden of showing "it did not act with malice, fraud or oppression, in refusing to defend and/or indemnify."

At trial, before a jury was impaneled, the parties submitted certain issues to the court for its determination on stipulated facts. The court found as matters of law that (1) Industrial has no indemnity obligation because the "property damage" within the meaning of the CGL policy was not corrosion of the underground pipes, but resultant leaks that did not occur during the policy period; (2) an exclusion for Padre's work product is inapplicable,

---

<sup>2</sup> In California, an insurance policy must contain a provision that "whenever judgment is secured against the insured . . . in an action based upon bodily injury, death, or property damage, then an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment." (Ins. Code, § 11580, subd. (b)(2).)

and (3) Industrial had a duty to defend Padre in the underlying action, but because Golden Eagle provided a defense, damages are limited to the \$2,760.33 Padre paid *Cumis* counsel. Judgment for Qualcomm in that amount was entered on April 27, 2000.

## DISCUSSION

### I

#### *Motion to Dismiss*

Preliminarily, we dispose of Industrial's motion to dismiss Qualcomm's appeal as premature. Industrial asserts the judgment does not resolve Qualcomm's causes of action against it for breach of contract and breach of the implied covenant of good faith and fair dealing. Specifically, Industrial complains that Qualcomm's rights under Insurance Code section 11580, subdivision (b)(2) as a judgment creditor of Padre and any liability of Industrial for bad faith remain outstanding.

An appeal may be taken from a "judgment." (Code Civ. Proc., § 904.1, subd. (a)(1).) "A judgment that leaves no issue to be determined except the fact of compliance with its terms is appealable." (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 9.)

As developed further below, the judgment leaves no material issue unresolved. The court expressly granted Qualcomm judgment on both causes of action. Coverage under the policy is excluded by the work product exclusion and thus Industrial is not liable for the underlying judgment under either a breach of contract or judgment creditor theory. Further, Padre's rights were protected at trial by Golden Eagle, and thus amount of the underlying judgment is not properly included as damages for the refusal to defend. As damages for

breach of contract and tortious breach of contract, the court properly granted Qualcomm the amount of attorney fees Padre incurred in retaining *Cumis* counsel. Qualcomm is not entitled to punitive damages for the tort cause of action, as the court properly disposed of that claim on summary adjudication. Moreover, a business entity such as Qualcomm cannot recover emotional distress damages. (*Diamond View Limited v. Herz* (1986) 180 Cal.App.3d 612, 618.) There are no remaining issues regarding Qualcomm's rights as a judgment creditor or damages available for breach of the implied covenant of good faith and fair dealing. The parties' rights were fully adjudicated.

## II

### *Issues Decided as Matters of Law on Stipulated Facts*

The parties contend the trial court drew erroneous conclusions based on facts to which they stipulated. "Because the parties submitted the case to the trial court on a stipulation, the case presents no conflicting evidence. Therefore, this court is not constrained by the substantial evidence rule. The trial court's findings are not binding on us and we must make our own determination of the questions of law presented by the stipulated facts." (*Container Corp. of America v. Franchise Tax Bd.* (1981) 117 Cal.App.3d 988, 993.)

## A

### *Duty to Defend and Damages for Breach*

## 1

The parties asked the court to determine "[w]hether under the [stipulated] facts . . . Qualcomm (Padre) is entitled to recover costs of defense not paid by insurance."

Industrial contends the parties intended that the court determine the measure of damages for breach of the duty to defend, but not whether there was any such breach. The contention is without merit.

Industrial lodged a document with the court entitled "Duty to Defend Statement of Facts."<sup>3</sup> The stipulation included facts regarding Industrial's claims handling and rejection of Padre's tender of defense. In its trial brief, Industrial argued "there is no reason to [i]mpanel a jury in this case, given that, as a matter of law, Industrial owed Padre no duty to defend on the facts placed before the [c]ourt." The only reasonable inference is that the parties sought the court's determination on the duty to defend issue. As the trial court noted, without objection from Industrial, "[t]here has to be a duty to defend before we reach the issue of the damages."

2

Alternatively, Industrial contends the court's ruling in this action that there was no "property damage" during the policy period, and thus no coverage or duty of indemnity in the underlying action, established its lack of duty of defense as a matter of law.<sup>4</sup> This contention is also unmeritorious.

"A liability insurer owes a duty to defend its insured when the claim creates any *potential* for indemnity. [Citation.] The determination of whether the duty to defend arises

---

<sup>3</sup> We omit the full capitalization of many words appearing in this and other documents we quote from the record.

<sup>4</sup> As discussed below, we affirm the ruling that Industrial had no indemnification duty under the policy, albeit for a different reason than relied on by the trial court.

is made by comparing the terms of the policy with the allegations of the complaint and any known extrinsic facts, and any doubt as to whether the facts create a duty to defend is resolved in favor of the insured.' [Citation.]" (*Pacific Indemnity Co. v. Bellefonte Ins. Co.* (2000) 80 Cal.App.4th 1226, 1231, italics added.) "[T]he insurer need not defend if the third party complaint *can by no conceivable theory raise a single issue which could bring it within the policy coverage.*' [Citation.]" (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 300 (*Montrose I*), citing *Gray v. Zurich Insurance Co.*(1966) 65 Cal.2d 263, 276, fn. 15.)

"[T]he insurer must defend in some lawsuits where liability under the policy ultimately fails to materialize; this is one reason why it is often said that the duty to defend is broader than the duty to indemnify. [Citation.]" (*Montrose I, supra*, 6 Cal.4th at p. 299.) "The defense duty is a continuing one, arising on tender of defense and lasting until the underlying lawsuit is concluded [citation], or until it has been shown that there is *no* potential for coverage. . . . [Citation.]" (*Id.* at p. 295.)

An insurer contesting coverage may provide its insured a defense under a reservation of rights or file a separate declaratory relief action. Alternatively, it may "simply deny the request [for a defense] and take its chance that the trier of fact in an action alleging bad faith breach of the contractual duty to defend will agree that no defense was owed [citation]."

(*Amato v. Mercury Casualty Co.* (1993) 18 Cal.App.4th 1784, 1792 (*Amato I*)). "The risk that an insurer takes when it denies coverage without investigation is that the insured may later be able to prove that a reasonable investigation would have uncovered evidence to establish coverage or a *potential* for coverage." (*American Internat. Bank v. Fidelity &*



*Deposit Co.* (1996) 49 Cal.App.4th 1558, 1571, italics added.) An insurer may not "deny an insured a defense at a time when it has reason to believe that there is potential liability under the insurance policy, and then rely upon the results of the [underlying action] and subsequent factors to prove that there was in reality no potential liability in the first instance." (*Mullen v. Glens Falls Ins. Co.* (1977) 73 Cal.App.3d 163, 173.)

Here, the policy provided coverage for "property damage" caused by an "occurrence." "Property damage" is defined as "physical injury to or destruction of tangible property which occurs during the policy period." "Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." In the underlying complaint, Qualcomm alleged that in May 1993 it discovered a substantial leak in the underground pipes, and further inspections by professionals revealed defects in the insulation around the pipes and a substantial amount of corrosion and other leaks that occurred "over time."

In denying Padre a defense, Industrial relied on the "manifestation of loss" trigger of coverage.<sup>5</sup> The Supreme Court adopted the manifestation of loss rule in the first party property insurance context in *Prudential-LMI Com. Insurance v. Superior Court* (1990) 51 Cal.3d 674 (*Prudential-LMI*), which "holds the insurer insuring the property at the time appreciable property damage first becomes manifest solely responsible for indemnification

---

<sup>5</sup> "[T]rigger of coverage is a term of convenience used to describe that which, under the specific terms of an insurance policy, must happen in the policy period in order for the *potential* of coverage to arise. The issue is largely one of timing -- what must take place *within the policy's effective dates* for the potential of coverage to be 'triggered'?"

to the insured. For purposes of applying the rule, the time at which the property damage becomes manifest . . . is 'that point in time when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would be aware that his notification duty under the policy had been triggered.' [Citation.]" (*Montrose II, supra*, 10 Cal.4th, at p. 674, citing *Prudential-LMI, supra*, 51 Cal.3d at p. 699.)

However, in *Montrose II, supra*, 10 Cal.4th 645, the court rejected the manifestation of loss rule in the context of third party claims of continuous or progressively deteriorating property damage.<sup>6</sup> Rather, in such cases the "continuous injury" trigger of coverage applies, under which neither the negligent act nor the *date of discovery* of the damage is controlling. "It is only the *effect* -- the occurrence of . . . property damage during the policy period, resulting from a sudden accidental event or the 'continuous or repeated exposure to conditions' -- that triggers potential liability coverage." (*Id.* at p. 675.) The court held that when "successive CGL policy periods are implicated, bodily injury and property damage which is continuous or progressively deteriorating throughout several

---

(*Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 655, fn. 2 (*Montrose II*).)

<sup>6</sup> In *Montrose II* the court explained that "[p]rogressive property damage, or progressively deteriorating damage, are terms that refer to damage that occurs over an extended period of time, often during the effective periods of several successive insurance policies. In the property damage context, 'progressive' or 'progressively deteriorating' damage typically might involve continuing damage caused by, or resulting from, natural causes such as soil subsidence or dry rot, or man-made causes such as the disposal of industrial pollutants or toxic wastes that leach through or onto property adjoining the insured's land, or into the underlying water table." (*Montrose II, supra*, 10 Cal.4th at p. 658, fn. 6.)

policy periods is *potentially covered* by all policies in effect during those periods." (*Id.* at p. 689, italics added.)

In *Montrose II* the court approvingly cited *Gruol Construction Co. v. Insurance Co. of North America* (Wash.App. 1974) 524 P.2d 427 (*Gruol*). In *Gruol*, a contractor built an apartment building in 1963 and sold it to a third party the following year. In 1968, the owner sued the contractor for damage to the building caused by dry rot, which resulted from defective backfilling of soils against wood during construction. Insurers who successively insured the contractor between the dates of construction and discovery of the dry rot refused to provide a defense. The contractor prevailed in a breach of contract action against the insurers, when "[t]he court held that the injury was a continuous process which began at the time of the negligent construction and continued through the manifestation of the dry rot damage, ' "even though there [was] a lapse of time between the initial negligent act and the occurrence of the ultimate damage . . . ." [Citation.]" (*Montrose II, supra*, 10 Cal.4th at pp. 677-678, citing *Gruol, supra*, 524 P.2d at p. 430.)

In *Pepperell v. Scottsdale Ins. Co.* (1998) 62 Cal.App.4th 1045, the court applied a continuous injury trigger of coverage in the construction defect context. The insured completed construction of a home in 1988, the liability policy expired in 1989 and defects in construction were not discovered until 1991 when the home began to leak. The court noted that "[i]n a nutshell, the rule to be gleaned from *Montrose II* and the authorities contributing to its analysis is that continuing or progressive property damage is deemed to occur over the entire process of the continuing injury." (*Id.* at p. 1053.) The court held the insurer was not entitled to summary judgment on the duty to defend issue because it did not

"eliminate triable issues of fact raised by the . . . complaint with regard to property damage being a process *which began at the time of construction and continued through the manifestation of leakage* and the ultimate devastation of the residence." (*Id.* at p. 1054, italics added.)

In *Montrose II*, only the duty of defense issue was before the court. The court did not reach the ultimate merits of the coverage issue, holding that "[w]hether the damages and injuries alleged were in fact 'continuous' is itself a matter for final determination by the trier of fact. [Citations.]" (*Montrose II, supra*, 10 Cal.4th at p. 694.) *Montrose II* was decided after Industrial initially denied Padre a defense, but Qualcomm brought the case to Industrial's attention before trial in the underlying action and it refused to change its position.

The policy language and complaint allegations raised the potential of coverage under the Industrial policy, and thus it owed Padre a defense. Although Qualcomm was unaware of leaks in the underground pipes during the policy period, the date of discovery of property damage is not dispositive. The complaint alleged corrosion of and leaks in the underground pipes occurring "over time." "Corrosion is, by definition, a gradual process." (*ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co.* (1993) 17 Cal.App.4th 1773, 1795.) The trier of fact may have been presented with evidence from which it could find continuous or progressively deteriorating property damage between as early as

September 1989, when Padre damaged the insulation around the pipes and exposed them to moisture, and May 1993, when Qualcomm first discovered corrosion and leaks.<sup>7</sup>

3

Qualcomm contends the court erred by finding that Industrial's breach of the defense duty does not require it to pay the judgment in the underlying case. The court stated that Industrial's "failure to defend Padre . . . does not make [it] liable for any amounts under the judgment entered in that action because [its] failure to defend could not have been the proximate cause of the entry of that judgment." Presumably, the court relied on Golden Eagle's provision of a defense to Padre in the underlying action.

"Breach of an insurer's duty to defend violates a contractual obligation and, where unreasonable, also violates the covenant of good faith and fair dealing, for which tort remedies are appropriate. [Citation.] Contractual damages are 'the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.' [Citations.] Tort damages are 'the amount which will compensate for all the detriment proximately caused

---

<sup>7</sup> It has been noted that in the construction defect context, "[m]any . . . types of damage could . . . fall into the 'continuous or progressively deteriorating' category. The category of damage, and therefore the trigger to be applied, will ultimately be left to the experts to determine. The experts will not only need to ascertain the type of damage, but they will also have to calculate the period in which the damage occurred. In many cases, continuous damage will be able to be traced to the time of installation. However, in some instances damage may not begin until some time after installation, and then will continue from that point on." (Note, *Montrose Chemical Corp. v. Admiral Insurance Co. and Its Effect on Construction Defect Litigation* (Spring 1996) Cal. Western L. Rev. 359, 376.)

thereby, whether it could have been anticipated or not.' [Citations.]" (*Amato v. Mercury Casualty Co.* (1997) 53 Cal.App.4th 825, 831 (*Amato II*).

The consequences of an insurer's breach of the duty to defend may depend on whether the action against the insured was actually, rather than merely potentially, covered under the policy. (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2001) ¶ 7.690, p. 7B-51.) If the insurer breached its duty to defend, but "it is ultimately determined (e.g., in a subsequent coverage action) that there was no coverage under the policy, the insured is still entitled to recover at least the costs *incurred in defense* of the underlying action." (*Id.* at ¶ 7.691, p. 7B-52.) The general measure of damages "is that amount which will compensate the insured for the harm or loss caused by the breach . . . , i.e., the cost incurred in defense of the underlying suit." (*Amato I, supra*, 18 Cal.App.4th at p. 1794.)

Qualcomm relies on *Amato II, supra*, 53 Cal.App.4th at page 831, in which the court held that damages for the insurer's breach of the duty to defend included the amount of the underlying judgment. However, in *Amato II* the insured was financially unable to defend himself and as a result he suffered a default judgment of \$165,000. The court explained that "where the insurer tortiously refuses to defend and as a consequence the insured suffers a default judgment, the insurer is liable on the judgment and cannot rely on hindsight that a subsequent lawsuit establishes noncoverage." (*Id.* at p. 833.)

Qualcomm also relies on *Mullen v. Glens Falls Ins. Co., supra*, 73 Cal.App.3d 163, in which the insurer's refusal of a defense required the insured to retain counsel at his own expense. Although the judgment against the insured was based on intentional misconduct, a

noncovered event, the court held the damages for breach of the duty to defend included the amount of the underlying judgment. The court was concerned that breaches of the duty to defend impose "an undue financial burden on persons who have purchased insurance protection, [and] could deprive them of the expertise and resources available to insurance carriers in making prompt and competent investigations as to the merits of lawsuits filed against their insureds." (*Id.* at p. 174.)

Here, Padre was not compelled or unable to defend itself in the underlying action.<sup>8</sup> Qualcomm points out that Golden Eagle did not assume Padre's defense until after a default judgment was entered against it, but the judgment was set aside and caused no harm. Moreover, Qualcomm does not assert that Golden Eagle's investigation or representation was deficient in any manner or that the judgment would have been more favorable to Padre had Industrial provided it a defense. Under these circumstances, Industrial's breach of the duty to defend does not expose it to liability for the underlying judgment. When an insured "was fully protected from having to pay *any* costs of its own defense by other insurers who were on the risk," the insured is not even entitled to costs of defense from the breaching insurer. (*Ringler Associates, Inc. v. Mayland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1187; *Ceresino v. Fire Ins. Exchange* (1989) 215 Cal.App.3d 814, 823 [insurer's failure to defend was of "no consequence" to the insured when another insurer provided a defense].)

---

<sup>8</sup> In its opening brief, Qualcomm asserts that Golden Eagle withdrew its defense of Padre "just prior to trial in the underlying action." However, Qualcomm's citations to the appellate record do not support that assertion. The court's statement of decision in the underlying action states Padre was represented at trial by Golden Eagle's in-house counsel.

Industrial contends the court erred by awarding Qualcomm the \$2,760.33 Padre paid attorney Ruben Tarango. Golden Eagle defended Padre under a reservation of rights, and shortly before trial it informed Padre that coverage under the policy was excluded. Padre then hired Tarango to protect its interests. Tarango attended a settlement conference in which Golden Eagle's counsel advised the court that Padre's liability "was clear," but Golden Eagle would contribute no funds to a settlement. Tarango unsuccessfully attempted to convince Golden Eagle to settle the matter. Tarango also communicated with Golden Eagle's counsel regarding trial matters, such as whether Padre should waive a jury. Moreover, Tarango participated in the trial.

A conflict of interest entitled Padre to independent counsel at Golden Eagle's expense. (*San Diego Federal Credit Union v. Cumis Ins. Society, Inc.*, *supra*, 162 Cal.App.3d at p. 375.) Golden Eagle did not reimburse Padre for Tarango's fees, and we cannot fault the trial court for attributing the expense to Industrial's breach of the duty to defend. Industrial should have defended Padre, and, assuming it would have done so under a reservation of rights, provided Padre with *Cumis* counsel.

## B

### *Exclusion of Coverage*

The trial court found there was no property damage until May 1993 when Qualcomm discovered a pipe leak, and thus no occurrence of property damage during the policy period. The court relied on the parties' stipulation that "there are defects in the insulation [around the underground pipe] which permit portions of the metal pipe to be repeatedly or continuously exposed to moisture and corrosive soils causing corrosion which eats away at



the metal of the pipe but does not result in an actual hole through the pipe and leaking of fluid out of the pipe during the policy period."

Qualcomm contends the ruling is erroneous because the corrosion of the pipes that ultimately caused the leaks was physical injury to tangible property, and the corrosion began during the policy period. Qualcomm made an offer of proof that its expert witness would so testify.

Industrial asserts that even if corrosion were considered property damage within the meaning of the policy, the underlying claim falls within a coverage exclusion. We agree, and thus are not required reach the propriety of the court's ruling on the property damage issue. "No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' [Citation.]" (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal. 3d 1, 19, disapproved on other grounds in *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 944.)

The policy excludes coverage "with respect to the completed operations hazard, to property damage to work performed by the named insured arising out of such work or any portion thereof, or out of such materials, parts, or equipment furnished in connection therewith." "The risk intended to be insured [under a CGL policy] is the possibility that the . . . work of the insured, once relinquished or completed, will cause bodily injury or damage

to property other than to the product or completed work itself . . . .' [Citations.] The policy is neither a performance bond nor an 'all risk' policy. [Citation.] Rather, the effect of the policy is to make the contractor stand its own replacement and repair losses while the insurer takes the risk of injury to the property of others. ¶ . . . By excluding repair and replacement losses, the insurer gives the contractor an incentive to exercise care in workmanship thereby reducing the risk that is covered: damage to property of third parties." (*Western Employers Ins. Co. v. Arciero & Sons, Inc.* (1983) 146 Cal.App.3d 1027, 1031.)

The trial court determined the work product exclusion is inapplicable because it "does not exclude damage caused by Padre to work of [the] subcontractors." The court presumably relied on the fact that the underground pipes and insulation were originally installed by Padre's subcontractors. However, the parties stipulated that Padre was "required to unearth and remove . . . the insulated pipe, dig the trench deeper, and then replace the insulated pipe, and in this process, [Padre] damage[d] the pipe . . . and . . . insulation."

"' "While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply." [Citation.] Thus, "the mutual intention of the parties at the time the contract is formed governs interpretation." [Citation.] If possible, we infer this intent solely from the written provisions of the insurance policy. [Citation.] If the policy language "is clear and explicit, it governs." [Citation.]' " (*Stamm Theaters, Inc. v. Hartford Casualty Ins. Co.* (2001) 93 Cal.App.4th 531, 538.)

Under the plain meaning of the policy, the alleged property damage -- corrosion and leaks in the pipes -- was to "work performed by the named insured" -- the relaying of the pipes and insulation. "[A]n insured's faulty workmanship is not 'property damage' under California law." (*Golden Eagle Ins. Co. v. Travelers Companies* (9th Cir. 1996) 103 F.3d 750, 757, overruled on another ground in *Government Employees Ins. Co. v. Dizol* (9th Cir. 1998) 133 F.3d 1220, 1227.) Another holding would improperly shift Padre's responsibility to repair or replace its defective work to Industrial.

Further, the exclusionary clause is conspicuous, plain and clear, as required to be enforceable. (*De May v. Interinsurance Exchange* (1995) 32 Cal.App.4th 1133, 1137.) Industrial had no obligation to indemnify Qualcomm, as Padre's assignee, or to satisfy the judgment it obtained against Padre. (Ins. Code, § 11580, subd. (b)(2).)<sup>9</sup>

### III

#### *Summary Adjudication of Punitive Damages Claim*

Qualcomm contends the trial court erred by disposing of its punitive damages claim on summary adjudication. "A defendant is entitled to summary adjudication if the record establishes that the plaintiff's [claim] cannot succeed as a matter of law. [Citations.]" (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1507.) "A court must 'strictly construe

---

<sup>9</sup> Although coverage is excluded under the work product exclusion, it did not relieve Industrial of its duty to defend Padre in the underlying action. The exclusion applies only to property damage to work performed by Padre; it does not apply to property damage to work performed by subcontractors. The complaint in the underlying action alleged that "defendants," including Padre and Does I through XXX, "had not done their work in a proper and workmanlike manner." The complaint did not conclusively negate the potential for

the moving party's papers and liberally construe those of the opposing party to determine if they raise a triable issue of material fact.' [Citation.] We conduct a de novo review."

(*Calhoon v. Lewis* (2000) 81 Cal.App.4th 108, 112.)

"Although the basic principle of damages is compensation, additional damages may be given in tort actions where the defendant's conduct has been outrageous, for the purpose of punishing him and deterring him and others from such conduct in the future."

(6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1327, pp. 784-785; Civ. Code, § 3294, subd. (a).)<sup>10</sup> "Evidence that an insurer has violated its duty of good faith and fair dealing does not thereby establish that it has acted with the requisite malice, oppression or fraud to justify an award of punitive damages. [Citations.] In order to establish that an insurer's conduct has gone sufficiently beyond mere bad faith to warrant a punitive award, it must be shown by *clear and convincing evidence* that the insurer has acted maliciously, oppressively or fraudulently." (*Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 328.)

Qualcomm asserts that Industrial was guilty of malice and oppression. "'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or

---

coverage because the property damage could have been to work performed by subcontractors.

<sup>10</sup> Civil Code section 3294, subdivision (a) provides: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civ. Code, § 3294, subd. (c)(1).)

"'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code, § 3294, subd. (c)(2).)

"Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' [Citation.] As amended to include this word [despicable], the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willfull and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725.) "Punitive damages are appropriate if the defendant's acts are reprehensible . . . or in blatant violation of law or policy. The mere carelessness or ignorance of the defendant does not justify the imposition of punitive damages. . . . Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff's rights, a level which decent citizens should not have to tolerate." (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1287.)

Qualcomm presented no evidence from which a jury could reasonably conclude that Industrial's denial of a defense constituted despicable conduct. Rather, the evidence merely raised issues regarding whether Industrial's claims handling was negligent or otherwise deficient. For instance, Qualcomm relied on evidence that Industrial failed to (1) properly analyze the coverage and exclusions under the policy and relevant case law, (2) properly or timely investigate the claim or advise Padre of the status of the claim, (3) keep appropriate

records or a complete claims file, and (4) provide the adjuster with appropriate guidelines. Industrial was entitled to judgment as a matter of law on Qualcomm's punitive damages claim.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

---

McCONNELL, J.

WE CONCUR:

---

BENKE, Acting P. J.

---

HUFFMAN, J.